

ORIGINAL

Decision No. 79665

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Investigation)
 into the rates, rules, regulations,)
 charges, allowances and practices)
 of all common carriers, highway)
 carriers and city carriers relating)
 to the transportation of any and)
 all commodities between and within)
 all points and places in the State)
 of California (including, but not)
 limited to, transportation for)
 which rates are provided in Minimum)
 Rate Tariff 2).

Case No 5432
 Petition for Modification
 No. 660
 (Filed July 16, 1971)

And Related Matters.

Case No. 5433, Petition No. 38
 Case No. 5436, Petition No. 112
 Case No. 5437, Petition No. 211
 Case No. 5438, Petition No. 83
 Case No. 5440, Petition No. 75
 Case No. 5604, Petition No. 28
 Case No. 7857, Petition No. 50
 Case No. 8808, Petition No. 15
 (Filed July 16, 1971)

Richard W. Smith and A. D. Poe, Attorneys at Law,
 and H. F. Kollmyer, for California Trucking
 Association, petitioner.
A. L. Libra, Attorney at Law, and Jess J. Butcher,
 for California Manufacturers Association; Don B.
Shields and Milton Flack, Attorney at Law, for
 Highway Carriers Association; Keith E. Miller,
 for Miller Traffic Service; James W. Harris,
 for Southern California Edison Co.; Robert A.
Kormel, for Pacific Gas and Electric Company;
Allen E. Taylor, for Kaiser Steel Corporation;
Harold Summerfield, for Bethlehem Steel Corpora-
 tion; R. Canham, by A. A. Wright, for Standard
 Oil Company; C. H. Caterino, by Jess Butcher,
 for Flintkote Co.; W. D. Grindrod, by Jess
Butcher, for Norris Industries; and Robert
Bosley, by Jess Butcher, for Shell Oil Company;
 protestants.
Robert G. Norvall, for Continental Can Co., Inc.,
 interested party.
E. Q. Carmody, for the Commission staff.

OPINION ON MOTION TO DISMISS
PROCEEDING WITHOUT RECEIPT OF
EVIDENCE

California Trucking Association (CTA), petitioner, seeks amendment of various minimum rate tariffs issued by this Commission to cancel therefrom provisions authorizing the combination of rates in said tariffs with alternatively applied common carrier rates.

California Manufacturers Association (CMA), on July 27, 1971, filed a motion to dismiss the proceedings herein, and requested said motion be set for hearing and a decision be issued thereon prior to the taking of evidence in said proceedings.

A duly noticed public hearing was held and submitted on December 6, 1971, before Examiner Mallory in San Francisco, limited to argument on CMA's motion to summarily dismiss the proceedings herein.

Argument in support of the motion was presented by CMA, Pacific Gas and Electric Company (PG&E) and the Commission's Transportation Division staff.

It is the position of CMA that the proposal of CTA in these proceedings, if granted, would result in a violation of Article XII, Section 21, of the Constitution of the State of California. Insofar as is pertinent herein, said section provides as follows:

"Sec. 21. No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, or in the facilities for the transportation of the same classes of freight or passengers within this State. It shall be unlawful for any railroad or other transportation company to ... charge any greater compensation as a through rate than the aggregate of the intermediate rates ..." (The second sentence in the above quotation is commonly referred to as the "aggregate of intermediates" rule or prohibition.)

CMA asserts that the result of the petitions herein would be a clear violation of the "aggregate of intermediates" prohibition

in the Constitution and, as the Commission has no authority to waive this prohibition (Southern Pacific Company, 4 C.R.C. 649), the petitions herein should be summarily dismissed without receipt of evidence. CMA urges that only a conclusion of law is involved, which requires no determination on facts.

PG&E and the Commission staff support this contention. The Commission staff also argues that the matters should be dismissed because they will result in discrimination if granted.

CTA argued that this Commission and the courts have not interpreted the application of the "aggregate of intermediates" rule with respect to transportation performed by highway permit carriers; that said carriers are free to assess rates in excess of minimum rates established by this Commission; therefore, it cannot be determined whether a violation of the "aggregate of intermediates" rule occurs except in connection with individual transactions. CTA and the California railroads urged that the question of whether the granting of the petitions herein would result in a violation of the "aggregate of intermediates" prohibition in the Constitution cannot be determined in a vacuum and that determination of this question must be predicated upon a factual showing.

The "aggregate of intermediates" prohibition in Article XII, Section 21 of the Constitution is a prohibition against a specific form of discrimination. This Commission has held that discrimination is a question of fact and whether it is undue or illegal is a question of fact. Section 460 (formerly Section 24(a)) of the Public Utilities Code imposes upon the Commission the duty of determining these questions of fact (Southern Pacific Company, 10 C.R.C. 354, 356).^{1/}

^{1/} Section 460 is a codification in the Public Utilities Act of the pertinent provisions of Article XII of Section 21 of the Constitution.

This Commission and the courts have held that where two distinct and different types of passenger services are involved, the "aggregate of intermediates" rule is not contravened when the through fares for one type of service exceed the sum of the fares for a different service (City of Pasadena v. Railroad Commission of California (1923) 218 P. 412, 192 C. 61). It appears, therefore, that whether or not the prohibition against "aggregate of intermediates" violation is contravened depends upon the particular factual situation and is not proscribed per se.


Without a factual determination of the situation which will exist should the petitions herein be granted, it is not possible for the Commission to determine that the granting of said petitions will result in a contravention of the constitutional provisions prohibiting the charging of through rates which exceed the combinations of intermediate rates. We conclude therefore that the motion to dismiss these proceedings without receipt of evidence, filed by CMA, should be denied.

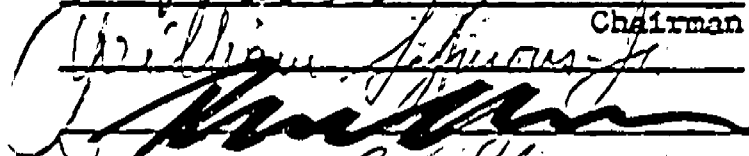
O R D E R


IT IS ORDERED that the motion of California Manufacturers Association to dismiss Petition No. 660 in Case No. 5432 and related petitions, filed July 27, 1971, is denied.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 10th day of FEBRUARY, 1972.



Chairman




Commissioners